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	:	SUPREME COURT OF NEW JERSEY
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STATE OF NEW JERSEY	:	DOCKET NO.:072323
Plaintiff-Respondent:	:	
	:	
v.	:	CRIMINAL ACTION
	:	
GIUSEPPE TEDESCO,	:	
Defendant-Appellant	:	Sat Below:
	:	Hon. Anthony J. Parrillo, P.J.A.D.
	:	Hon. Douglas M. Fasciale, J.A.D.

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BRIEF & APPENDIX ON BEHALF OF  
DEFENDANT-APPELLANT GIUSEPPE TEDESCO

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Dated: April 1, 2013

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**STATEMENT OF PROCEDURAL HISTORY**

Defendant/Appellant Giuseppe Tedesco was charged by way of indictment with Murder contrary to N.J.S.A. 2C:11-3(a)(1) or (2); Unlawful Possession of a Weapon contrary to N.J.S.A. 2C:39-5b; and Possession of a Weapon for an Unlawful Purpose contrary to N.J.S.A. 2C:39-4a. (Aa1)<sup>1</sup> Empanelment of the jury commenced on September 12, 2012. The matter was tried before Hon. N. Peter Conforti, J.S.C. with testimony taking nearly nine trial days in December 2012. Closing arguments and jury charges proceeded in early January 2013, with a verdict of guilty on all counts was rendered on January 10, 2013. Sentencing was set for March 20, 2013.

On February 8, 2013, Appellant executed a written waiver, pursuant to R. 3:21-4(b), intending to waive his presence at sentencing and waiving his right to allocute and any right to appeal a denial of that right. (Aa4). This waiver was provided to trial court and the Office of the Sussex County Prosecutor early the following week.

The victim's mother, Michelle Ruggieri, through attorney Richard Pompelio of the Victim's Rights Law Center filed a Motion on February 25, 2013, seeking to compel the presence of the defendant at sentencing. (Aa5) After a conference call with

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<sup>1</sup> Aa refers to Defendant/Appellant's appendix.

all of the parties the motion was set to be argued on March 13, 2013. Appellant submitted a letter brief on the merits of the issue and Mrs. Ruggieri's ("Movant") standing to file same. The State joined in the Movant's position.

On March 13, 2013, after hearing brief argument, the trial court granted the Movant's motion and ordered that the Appellant be produced for sentencing. 1T20-4<sup>2</sup> Counsel for Appellant unsuccessfully requested a stay of the sentencing to permit time to seek Leave to Appeal from the Appellate Division. 1T23-6 (Aa7)

Later that day, Appellant filed an application seeking permission to file an emergent motion. (Aa8) On March 14, 2013, the Appellate Division advised the parties by telephone that it was requesting briefs be submitted by Noon on March 15, 2013. All parties complied with this request.<sup>3</sup> On March 18, 2013, the Appellate Division filed an order granting leave to appeal then affirming the decision of the trial court. (Aa12). The Appellate Division subsequently denied Appellant's request for a stay of the sentencing to permit him to seek leave to appeal from the New Jersey Supreme Court. (Aa16).

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<sup>2</sup> 1T refers to the verbatim transcript of the March 13, 2013, Motion hearing and decision.

<sup>3</sup> These briefs were made part of the record and submitted to this Court with Appellant's emergent application.

On March 19, 2013, Appellant filed a Notice of Motion with the New Jersey Supreme Court requesting a stay of the sentencing and leave to appeal the decision of the Appellate Division.

(Aa18) Later that day, the Court granted Appellant's application for a stay of the sentencing and ordered that merits briefs be filed by April 2, 2013, and set a date for oral argument. (Aa20)

**STATEMENT OF FACTS**

This case has been contentious and fraught with hostility since Appellant's arraignment. This includes prior occasions where epithets were yelled from the gallery during pre-trial conferences and other appearances. During the jury deliberations on January 9, 2013, a fight broke out in the audience between members of the two families.<sup>4</sup> (Aa21)

On January 10, 2013, after a month-long trial, Giuseppe Tedesco was convicted by a jury of Murder, Possession of a Weapon for an Unlawful Purpose and Unlawful Possession of a Weapon stemming from a March 27, 2010, incident in Hopatcong, New Jersey. In the wake of the verdict, an altercation ensued between Mr. Tedesco and members of the Ruggieri family in the gallery which resulted in new charges being filed against the Defendant. These charges include Aggravated Assault against a Police Officer as one of the Sussex County Sheriff's Officers incurred a concussion and a broken leg in the fracas. After this interaction between Mr. Tedesco and the Sussex County Sherriff's Department, Appellant was moved from the Sussex County Jail to the New Jersey State Prison in Trenton, where he remains to this day.

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<sup>4</sup>Attached as part of the Appendix is a newspaper article detailing this specific incident and others that occurred throughout the proceedings.

On February 8, 2013, Appellant executed a waiver of his appearance at sentencing consistent with the requirements of N.J.S.A. 3:21-4(b). In his waiver, Appellant also waived his right to allocute to the Court as well as his right to raise a denial of same in any appeal.



**PRELIMINARY STATEMENT**

This is an apparent matter of first impression with no prior decisions reported by either the Superior Court - Appellate Division or the New Jersey Supreme Court. After being convicted of three charges including Murder, Appellant exercised his ability to waive his right to be present at sentencing. There is no dispute that the Appellant has a Constitutional right to appear at his sentencing. Appellant does not contend that he has a Constitutional right to absent himself from sentencing; rather he has contended throughout this process that his actions in compliance with the Rules of Court, absent any conflicting statutes, rules or decisional precedent, are sufficient to waive his appearance at sentencing. Appellant contends that the NJCVBoR does not negate his right to waive his appearance but exists in harmony with R. 3:21-4(b).

New Jersey Rules of Court establish a procedure by which a defendant may waive his appearance at sentencing. The Rule is silent other than requiring the waiver be made in writing and appears to vest all of the power within the defendant. It is undisputed that Appellant complied with the requirements of the Rule.

The Movant claims to have standing based in the New Jersey Crime Victim's Bill of Rights. ("NJCVBoR") This is disputed by

the Appellant. The NJCVBoR confers upon victims a right to file motions to vindicate rights conferred within the statute. The statute specifically confers the right for a victim to make an impact statement to the court at sentencing. The statute neither permits a statement to be made directly to the defendant nor even contains a provision discussing the presence of the defendant during the statement. Appellant has never advocated against the victim's right to speak at sentencing and has not argued that such a right does not exist. Absent an express granting of a right to compel the defendant's presence, the Movant is without standing to file a motion for such relief.

An examination of the controlling statutes and Rules of Court compel the decision that a defendant who complies with the waiver provision is entitled to absent himself from sentencing. The NJCVBoR was enacted originally in 1991 and was revised as recently as August 2012. In its most recent revision, the Legislature and Governor Christie added provisions regarding the rights of victims at sentencing. The bill remains silent with regard to the right to speak to a defendant; it continues to only grant a right to speak to the court. Had the legislature deemed this right to exist certainly it could have included same in the recent amendment. Similarly, the Rules of Court have been amended several times since the initial enactment of the NJCVBoR

and the waiver provision remains intact without any conditions precedent.

Rule 3:21-4(b) contains a waiver provision. All parties agree Appellant fully complied. The plain language of the Rule vests the power in the defendant to determine if he wishes to be present at his sentencing. No decisional precedent binding upon this Court, or otherwise, exists in contravention of the enforcement of the valid waiver. Any cases cited by the Movant below are, at the least, factually distinguishable and neither binds nor should persuade this Court. Under the present statutory scheme read in conjunction with the Rules of Court and the evolving common law the Appellant's waiver must be honored.

The State has cited below to R. 1:1-2 to demonstrate that the trial court's actions were appropriate in disregarding the standard of R. 3:21-4(b). The criteria for such a relaxation, as outlined in the Rules of Court have not been satisfied.

Public policy reasons are not sufficient to subvert the Rules of Court. Presently the Appellant knowingly and validly waived his right to allocute to the trial court and his right to raise such a denial on appeal. Contrary to the contention by the Movant, this case will not be returned to the trial court on a successful petition for post-conviction relief premised solely on a denial of the right to allocute.

## LEGAL ARGUMENT

## POINT ONE: THE MOVANT LACKS STANDING TO FILE THE MOTION

The issue of standing requires scrutiny by this Court due to the potential disparate impact of a decision permitting these motions would have on similarly situated defendants throughout the State. Both Movant and the trial court cited the New Jersey Constitution and the Crime Victim's Bill of Rights as codified in New Jersey law at N.J.S.A. 52:4B-36 as providing standing to file the motion. 1T The panel below did not address the standing issue directly in its opinion. (Aa12)

The NJCVBoR explicitly provides victims standing to file motions under limited circumstances. The victim has, "standing to file a motion or present argument on a motion filed to enforce any right conferred herein or by Article I, paragraph 22 of the New Jersey Constitution." N.J.S.A. 52:4B-36(r). The statute is clear in that standing to file motions exists only in cases where the victim's rights "conferred herein" are being implicated. The opposite is also true; there is no standing to file motions to vindicate rights not specifically conferred by the statute or Amendment.<sup>5</sup> The right to compel a defendant's

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<sup>5</sup>As the Movant cited below, the court should look to State v. Muhammad 145 N.J. 23, 42-43 (1996) for the proposition that one need not delve deeply into the intent of the statute because the intent is clear. Likewise, the intent to establish the bounds of the privileges within the Amendment is equally clear and the court must accept that absent superseding precedent that

presence at sentencing or to speak directly to a defendant is not conferred upon victims by the Constitution, statute or common law. Consequently standing does not exist to attempt to enforce these ungranted rights via motion practice as was done below.

The NJCVBOR expressly provides the rights afforded crime victims. Nowhere in that circumscribed statute exists a right to face a defendant in person at sentencing. When addressing sentencing, the Bill specifically enumerates that the victim has the right to make a statement to the court. N.J.S.A. 52:4B-36(n) The Appellant has never sought to deny the victim's family the right to make impact statements however neither tacit nor explicit authorization in New Jersey statutes, rules or decisional precedent exists granting the opportunity for the victim to personally address the defendant. Without any infringement on the rights of the victim, there is no standing for the present motion.<sup>6</sup>

The Movant has cited to State in the Interest of K.P. 311 N.J.Super. 123 (Ch. 1997) to support its claim of standing, this is belied by the facts of K.P. The facts in K.P. are

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anything not listed within the Bill or Amendment was intentionally exempted from same.

<sup>6</sup> There is no indication of the intended breadth of the victim's rights to bring motions beyond what is specifically enumerated in the statute. To decide otherwise would essentially permit the victim to file motions at any stage of any proceeding if it did not like a strategic tact taken by the State or the defense.

significantly different from the case at bar. K.P. was the victim of a crime that was being adjudicated in a juvenile court which was restricted from the public. A local newspaper petitioned the court to gain access to the proceeding and report on the case. K.P. was expected to testify in the matter and the publicity would have a direct impact on her. There the court was concerned about a direct detrimental effect on the victim and thereby construed the legislative intent to confer standing. No such direct effect exists presently since the defendant's absence will not bar the victim from making the impact statement guaranteed by the strictly constructed language of the statute and accordingly neither does standing.

The Movant also claimed below that this is not a novel matter in New Jersey jurisprudence. The Rules of Court are updated on a regular basis, in fact, the Supreme Court Committee on Criminal Practice<sup>7</sup> recently released its findings after a close study of the Rules of Court and other criminal issues. Likewise, the New Jersey Legislature and Governor Christie have taken a keen interest in protecting the rights of victims as demonstrated by the August 2012 passage of legislation amending the NJCVBoR and enlarging the rights of victims under the

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<sup>7</sup>As this Court is certainly aware the Rules are thoroughly reviewed by the Committee which is comprised of Judges, prosecutors and defense attorneys who then submit a report to the Court containing any recommended revisions or other action to be taken.

statute. Even with all of this recent study and activity R. 3:21-4(b) remains intact and the NJCVBoR continues to be silent with regard to the victim's ability to compel the presence of the defendant at sentencing. This cannot be deemed as a mere oversight by these bodies. Accordingly, the interests of justice dictate that the Court must Reverse the decision of the panel below and dismiss this motion as the Movant has not demonstrated that it has standing to bring same.

POINT TWO: THE DEFENDANT CONFORMED TO THE RULES OF COURT AND MUST THEREFORE BE PERMITTED TO WAIVE HIS APPEARANCE AT SENTENCING.

Assuming arguendo that this Court, like those below, determines that the Movant does in fact have standing there still exists no binding precedent which would serve to trump the strict permissive language of R. 3:21-4(b)<sup>8</sup>. The Appellant has never and does not presently assert that he has a Constitutional right to be absent from sentencing upon his request. Appellant has consistently argued throughout the pendency of this motion and the appeals that the trial court is bound to follow the dictates of the Rules of Court which explicitly permit the Defendant to choose whether or not to attend his sentencing<sup>9</sup>. The Rule provides a process by which a defendant may waive his appearance at sentencing. Here, it is uncontroverted that Mr. Tedesco has fully complied with the rule and thus Due Process dictates that his waiver be enforced.

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<sup>8</sup> This Court in State v. Morton, 185 N.J. 383 (1998) devoted an entire section of its opinion discussing the constitutionally protected rights of a defendant to absent himself from the trial and other ancillary procedures. Id. at 434 While the case is factually and legally distinguishable it is a good guidepost for the discussion of the requirements of the defendant's presence and instructive in that it vests the rights within the defendant and judges that the court's role is to ensure that any waiver is knowing and validly executed.

<sup>9</sup> Contrary to the assertions of the Movant below, Defendant's Due Process rights are not violated by following the established Rules of Court and the procedures authorized therein. This is especially true when the defendant makes and knowing and voluntarily waiver.



The Movant acknowledges the defendant's authorization, by Court Rule, to waive his appearance then argues that the discretion to grant the waiver is vested solely within the sentencing court but offers no authority for this assertion. Movant also argued that the Rule simply establishes a procedure to be followed if the court grants a waiver. This is contrary to the plain reading of the Rule and is again without any supporting legal authority.<sup>10</sup>

In its papers below, the State has argued that pursuant to R. 1:1-2 that the Rules of Court may be relaxed to avert an injustice. Sb8<sup>11</sup> The State also contended that granting Appellant's waiver would be tantamount to turning the court over to the defendant. The opposite would be the actual impact of same as it would be turning the courtroom over to the victim without the focus being on the defendant.

Rule 1:1-2 states, in pertinent part, "The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Defendant's absence from sentence would simplify the procedure at sentencing and not have any direct impact on

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<sup>10</sup> Likewise, the decision by the panel below failed to cite any authority vesting the authority to override a valid waiver in the sentencing court other than to cite R. 3:21-4 which does not support that proposition.

<sup>11</sup> Sb refers to the brief filed by the State in the Appellate Division.

the fairness of the proceeding as the State and the victim would still be entitled to make any desired presentation. Further it would certainly eliminate the extra expense and delay of moving the Appellant from Trenton to Newton and the significant prophylactic security measures that will need to be taken to ensure the safety of all in the courtroom. While the State and the courts below have contended that the defendant has been the sole source of disruption throughout the pendency of the matter this simply is not true.

The State further references a quotation from the commentary to R. 1:1-1 describing the supremacy of legislative enactments to the Rules of Court. Sb8 The difficulty that lies herein is that the cited statute is not in conflict with the Rules of Court and therefore delving into the hierarchy is unnecessary.

The NJCVBoR confers upon a victim the right to speak at sentencing. A victim has the right "to make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime." citing N.J.S.A. 52:4B-36(n). The Defendant does not wish to restrict the right of the victim to speak to the court at sentencing.

The statute is devoid of any mention of addressing the court in the physical presence of the defendant. The statute

clearly dictates that the victim is not to speak to the defendant but instead to the "sentencing court." There is no right conferred upon the victim to speak directly to a defendant or even in the presence of the defendant. Had the Legislature desired same it would have included the word defendant in the very specific language as described in State v. Muhammad 145 N.J. 23, (1996).

The defense has no objection to victim impact statements and has no intention to disenfranchise the victim from its constitutionally and statutorily assured right to speak. This right to a victim impact statement is not without limit. The victim is not permitted to directly address the defendant and it must be presumed that this was not written into the NJCVBOR for a specific reason, likely to maintain the decorum of the court setting.

The ruling below is completely devoid of any authority that binds the court in compelling the defendant's presence at sentencing for the purpose of assuring the rights of a victim. The Appellate Division reasoned that the defendant's absence would deny the victim its right to "meaningfully participate in the criminal justice system."<sup>12</sup> AD4 The panel also judged that the victim's right to be treated with dignity and respect

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<sup>12</sup>AD refers to the March 18, 2013, decision by the Appellate Division affixed hereto at Aa12

was denied by permitting the defendant to waive his appearance. This is belied by the reading of the NJCVBOR in conjunction with the Rules of Court.<sup>13</sup>

The panel also appeared to create an interest of the State in having the defendant face its victim at sentencing citing a federal case from the Northern District of California United States v. Turner, 532 F.Supp. 913 (N.D. Cal. 1982). The panel neglected to indicate that the federal system is simply not analogous to New Jersey in a matter like this as F.R.Cr.P. 43 is unequivocal in requiring the defendant's presence at sentencing.

Neither the Appellate Division nor the trial court provided any criteria upon which the decision to override a waiver should be founded. Without suggesting specific criteria or an explicit balancing test no defendant will ever be able to accurately predict whether its appearance will be compelled and it makes appellate review nearly impossible.

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<sup>13</sup> The Constitutional Amendment as well as the NJCVBOR codify in a meaningful manner, with regular reviews and revisions, what the Legislature believes is necessary to ensure the dignity of the victims. Both enactments enumerate with great specificity the rights and privileges bestowed upon victims to safeguard their dignity and respect. These specific rights include the right to submit a statement for the presentence report and the right to address the court at sentencing. Should the Legislature have deemed the presence of the defendant as being essential to the full enjoyment of the victim's rights it merely would have had to change the language to reflect that the victim has the right to personally address the court and the defendant. Absent evidence to the contrary, there is no reason to presume that such an omission was anything other than intentional.

This Court must also take into account the very peculiar nature of this case and the history of discord that has shrouded the proceedings from the initial appearance through the verdict. The victim's family has shouted unpleasantries at defense counsel<sup>14</sup>; there have been members of both sides forcibly removed from the court room; the Sheriff's Officers have intervened with parties from both the victim's and the defendant's family, on multiple occasions to attempt to suppress an altercation and other inappropriate behaviors exhibited by members of the gallery<sup>15</sup>, let alone the post-verdict mayhem described above. There exists a real concern for the safety of the defendant, the officers, the attorneys, court staff and the public. This concern is easily quelled by enforcing the waiver of the defendant. It is the simplest and most practical action that could be undertaken by the trial court to ensure the safety of all of those in attendance and is in strict compliance with the controlling Rules of Court.

Movant cited below to the case of Charles Cullen, a serial killer, who pleaded guilty in an arrangement to avoid the death penalty. The Movant claimed that the Cullen

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<sup>14</sup>This so concerned the trial court that it sua sponte provided a police escort to defense counsel from the court room to his vehicle on multiple occasions including the day of the verdict.

<sup>15</sup>See attached newspaper article describing the building tension.

decision<sup>16</sup> where Judge Armstrong chose to compel the defendant's presence at sentencing was based on the impact on the victim survivors of Cullen's proposed absence at sentencing. Closer inspection of the opinion reveals that Judge Armstrong actually rested his decision, in large part, on the practicality of producing Mr. Cullen at sentencing. "Reposed within this Court is the obligation to exercise its discretion, and for the trial judge to make a ruling of a practical nature." Cullen Decision at pg. 18<sup>17</sup>. The Court then ruminated over the practical factors to consider in its decision:

The Court notes that Mr. Cullen has been incarcerated at the Somerset County jail since the time of his arrest in December 2003. That correctional facility is merely across the street from this courthouse. Moreover, throughout this lengthy case, the sheriff's officer's staff have encountered no difficulty in ensuring that the Defendant has been able to attend and be present for the numerous appearances he has made. As such, the Court finds no practical impediments that would require a decision to allow the Defendant to waive his appearance at sentencing.

Id at 18

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<sup>16</sup> An apparent unpublished written decision on a motion which has no precedential or binding authority on this Court and was submitted by the Movant below unsigned. It is attached to this Motion at Aa22

<sup>17</sup> Pursuant to R. 1:36-3 a copy of this opinion is included in Appellant's Appendix

The present matter is almost diametrically opposed from a practical sense. Mr. Tedesco is presently being held at New Jersey State Prison which is several hours travel from the Sussex County Courthouse. There has been much acrimony in the proceedings throughout the pendency of this matter and with the heightened emotions conceded by the Movant; there is no reason to believe the consternation will not continue to manifest itself in inappropriate behavior. There obviously has been difficulty between the Defendant and the Sheriff's Officers. It is clear from his opinion that had Judge Armstrong believed the transport and/or production of the defendant to be impractical that he would have permitted the waiver.<sup>18</sup> Here, the trial court should have done the same.

Most instructive for the instant case with regard to the Cullen decision is Judge Armstrong's discussion of the controlling authority and how to properly interpret same. Cullen at 13. "It is axiomatic that in interpreting a legislative enactment the starting point is the language of the statute itself. If the language is clear, the sole function of the courts is to enforce it according to its terms." Cullen at 13 citing Velazquez v. Jiminez, 172 N.J.

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<sup>18</sup> He concludes his rationale with, "Finally, the Court finds no rationale of a practical nature that would interfere with Mr. Cullen's appearance. As such, the Court hereby compels Mr. Cullen's physical appearance at sentencing."

240, 256 (2002). That is precisely what the defense is requesting be done here.

The court continues its analysis, "while arguably implicit, the Court finds that no explicit directive can be found in N.J.S.A. 52:4B-36, requiring the Defendant's presence at sentencing for the purpose of offering the surviving members of Mr. Cullen's homicide victims the opportunity to address both the Court and Mr. Cullen himself." Id. at 14. The court left such a decision to the legislature or a higher court to change the law and rule as written. More than seven years later the law and rule have not been so amended.

Any review of the applicable law can only lead to the conclusion that a defendant has the privilege to waive his appearance at sentencing as long as he complies with R. 3:21-4(b). No party disputes that Appellant complied with the Rule. The victim has been granted an explicit right to speak at sentencing. This right is exercised through the delivery of an impact statement to the sentencing court.<sup>19</sup> Delivering said statement in the presence of the defendant is not a vested right. Accordingly the decision of the Appellate Division must be reversed.

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<sup>19</sup> The 2012 amendment to the NJCVBoR actually specifically touched on subparagraph (n) and through the revision the Legislature did not add in any language regarding the presence of the defendant. Such an omission can only be deemed intentional and this Court should be guided accordingly.



**CONCLUSION**

For the foregoing reasons the decision of the Appellate Division must be reversed as Movant did not have standing to file the present motion and on the merits of said motion, absent contravening authority the valid waiver submitted by Appellant is sufficient pursuant to R. 3:21-4(b) to absent him from sentencing and still permit the victim to exercise all of the rights guaranteed to her by the NJCVBoR and the New Jersey Constitution.

Respectfully submitted,

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JOSHUA H. REINITZ, ESQ.